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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MATSON PLASTERING CO., INC.
Petitioner

VS.

OPERATIVE PLASTERERS AND CEMENT MASONS
INTERNATIONAL ASSOCIATION AFL-CIO
PLASTERERS LOCAL UNION NO. 295
Respondents.

MATSON PLASTERING CO., INC.
Petitioner

VS.

LATHERS LOCAL UNION L-109, AND DEAN PUTHUFF,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Does a Federal District Court lose jurisdiction to issue a *Boys Market* injunction merely because the Union *disputes* whether its strike falls within the "no strike" clause and/or *disputes* whether its strike falls within the "arbitration" clause of a collective bargaining agreement?

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I

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in *Matson Plastering Co., Inc. v. Operative Plasterers And Cement Masons International Association, AFL-CIO Plasterers Local Union No. 295* (hereinafter *Matson Plastering v. Local 295*) is reported at 633

F. 2d 1307 (9th Cir., 1980) and is attached hereto as Appendix "B". The decision of the United States District Court For The Eastern District Of California in that same matter is also attached hereto as Appendix "A".

The decision of the United States Court of Appeals for the Ninth Circuit in *Matson Plastering Co., Inc. v. Lathers Local Union L-109, And Dean Puthuff* (hereinafter *Matson Plastering v. Local L-109*), is unreported, but is attached hereto as Appendix "E". The decision of the United States District Court For The Eastern District Of California in that same matter is also attached hereto as Appendix "D".

II

JURISDICTION

The decision of the United States Court Of Appeals for the Ninth *Circuit in Matson Plastering v. Local 295,* which is sought to be reviewed was dated and entered December 12, 1980. A petition for rehearing in banc by the United States Court of Appeals for the Ninth Circuit in that matter was denied on March 9, 1981. (See, Appendix "C").

The decision of the United States Court of Appeals for the Ninth Circuit in *Matson Plastering v. Local L-109,* which is also sought to be reviewed, was filed on April 30, 1981. No rehearing in banc by the United States Court of Appeals for the Ninth Circuit was requested.

The jurisdiction of this Honorable Court is invoked under Section 1254(1) of Title 28 of the United States Code.

III

STATEMENT OF THE CASE

Matson Plastering Co., Inc. (hereafter Matson Plastering) is hereby requesting this Honorable Court to review two decisions issued by the United States Court of Appeals for the Ninth Circuit in two separate cases, namely (1) *Matson Plastering v. Local 295* (Appellate Court Case No. 80-4277, District Court Case No. CV-80-92 MDC); and (2) *Matson Plastering v. Local L-109* (Appellate Court Case No. 80-4371, District Court Case No. CV-F-80-124 MDC).

In each case, the Ninth Circuit reversed a District Court injunction restraining strike activity. Since each union disputed whether its grievance with the employer (Matson Plastering) was subject to a no strike clause and arbitration clause contained within the respective collective bargaining agreements existing between the parties, the Ninth Circuit held that the District Court had no jurisdiction to enjoin the strike pending arbitration. The Ninth Circuit relied on *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO,* 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976) as authority for its above mentioned decisions.

Matson Plastering respectfully disagrees with the Ninth Circuits holdings. *Buffalo Forge* (in its 5 to 4 decision) does not deprive a District Court of jurisdiction to enjoin a strike simply because the union "disputes" whether the grievance underlying the strike falls within an arbitration clause and/or no strike clause of an applicable collective bargaining agreement. If that were the case, no strike

could ever be enjoined since the union would always claim that its grievance is excluded from the no strike and arbitration clauses of the collective bargaining agreement. *Boys Market v. Retail Clerks Union, Local 770,* 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199, (1970), which specifically confers jurisdiction upon District Courts to enjoin strikes under certain circumstances despite the Norris-La Guardia Act, 29 U.S.C. §§ 101 et seq., would thereby be rendered meaningless.

The facts surrounding each of the above cases is set forth below.

A. Facts Regarding Matson Plastering v. Local 295

On February 1, 1980, Matson Plastering executed a collective bargaining agreement with Local 295. Article XIV, § 1 of that collective bargaining agreement contains a no strike clause prohibiting strikes during the term of the collective bargaining agreement. (See, Appendix "H"). Article XIV, § 2 contains an arbitration clause requiring arbitration of all disputes concerning the interpretation of the collective bargaining agreement. (See, Appendix "H").

In October, 1979, *prior* to the above execution of the collective bargaining agreement, Local 295 attempted to assess a penalty against Matson Plastering pursuant to Article XIII (see Appendix "G") of the collective bargaining agreement for Matson Plastering's alleged late payment of a trust fund contribution required by Article XII (See Appendix "F") of the collective bargaining agreement. Matson Plastering refused to pay the penalty because it had not yet executed the collective bargaining agreement which Local 295 was attempting to enforce.

Local 295, however, contended that the collective bargaining agreement was effective in October, 1979, prior to Matson Plastering's February 1, 1980 execution of said collective bargaining agreement.

Then, after the collective bargaining agreement was executed, Local 295 took strike action because of Matson Plastering's refusal to pay the penalty assessment.

Matson Plastering contended that Local 295's strike violated the no strike clause of Article XIV § 1 of the collective bargaining agreement. Matson Plastering also contended that Local 295's refusal to arbitrate the legality of the assessed penalties and the legality of the strike violated the arbitration clause of Article XIV, § 2 of the collective bargaining agreement.

Local 295, however, contended that their dispute with Matson Plastering fell within an exception to the arbitration clause and no strike clause, located at Article XIII, § 2 (see Appendix "G") and Article XIV, § 2 (f) (see Appendix "H") of the collective bargaining agreement.

Therefore, on April 28, 1980, Matson Plastering filed a Complaint with the United States District Court For The Eastern District of California at Fresno, requesting a Temporary Restraining Order, Order To Show Cause Re Preliminary Injunction and Permanent Injunction compelling Local 295 to arbitrate the above dispute and simultaneously restraining Local 295 from continuing its strike during the pendency of that arbitration. On that same date, United States District Court Judge M. D. Crocker issued the requested Temporary Restraining

Order and on May 8, 1980, Judge Crocker issued the requested Preliminary Injunction.

Thereafter, on May 29, 1980, Respondent Local 295 appealed Judge Crocker's Judgment to the United States Court of Appeals for the Ninth Circuit. And on December 12, 1980, the United States Court of Appeals for the Ninth Circuit entered judgment vacating the District Court's Preliminary Injunction and remanding the case to the District Court for further proceedings consistent with the Ninth Circuit's opinion. A Petition For Rehearing In Banc was denied by the Ninth Circuit on March 9, 1981.

In vacating the District Court's Preliminary Injunction, the Ninth Circuit incorrectly construed *Buffalo Forge Co. v. United Steelworkers Of America, AFL-CIO,* 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976) as setting forth the rule that—"where it is *not clear* that the strike is over an arbitrable issue and is in violation of a no strike clause, the District Court has no jurisdiction to enjoin a strike pending the arbitrator's decision." [Emphasis added].[1]

B. Facts Regarding Matson Plastering v. Local L-109

On or about August 24, 1977, Matson Plastering executed a collective bargaining agreement with Local L-109. Article XX, § 1 of that collective bargaining agreement contains a no strike clause prohibiting strikes during the term of the collective bargaining agreement. (See, Appen-

[1] The Ninth Circuit further held, however, that the District Court nevertheless retained jurisdiction to determine whether the parties were obligated to arbitrate the applicability of the no strike clause and therefore remanded the case for a determination on that issue.

dix "J"). Article XX, §§ 1 and 6(a) of that collective bargaining agreement also contains an arbitration clause requiring arbitration of "all disputes, differences and grievances between the parties." (See, Appendix "J").

Under Article XX, § 1 and § 2, said arbitration is to be conducted before the "Joint Conference Committee" composed of three representatives of Matson Plastering and three representatives of Local L-109. (See, Appendix "J"). Article XX, § 7(a)-(j) sets forth the arbitration procedures. (See, Appendix "J"). Under those procedures, Matson Plastering is entitled to notice of the time, date and place of hearing, and a right to appear and present evidence at the hearing. Any decision rendered by the "Joint Conference Committee" is deemed final and binding on all parties to the dispute.

On October 26, 1979 (without any prior notice or opportunity to appear and present evidence) Matson Plastering received a communication from an organization entitled "Joint Conference Board" notifying Matson Plastering that Matson Plastering's contributions to various trust funds had been paid one or two days late, and that the "Joint Conference Board" was therefore imposing a fine on Matson Plastering in the amount of $775.78.

The *"Joint Conference Board"* (who imposed the above-mentioned penalty on Matson Plastering) is different from the *"Joint Conference Committee"* (referred to in the above-mentioned collective bargaining agreement). The "Joint Conference Board" is an organization composed of only three representatives of three different unions (namely Local Union L-109, Plasterers Local Union No.

295, and Hod Carriers Local Union No. 262, all of whose collective bargaining agreements provide for employer contributions into the same health and welfare trust fund, vacation trust fund, and pension trust fund). However, the "Joint Conference Board" does not contain any employer representative. On the other hand, the "Joint Conference Committee" consists of three employer representatives and three representatives of Local L-109. (See, Appendix "J").

Matson Plastering refused to pay the penalty assessed by the "Joint Conference Board" because its trust fund contributions were not late, and the "Joint Conference Board" had no authority to determine whether they were late. Matson Plastering further contended that the question of whether its contributions were late, and the question of whether a penalty should be assessed was instead subject to compulsory arbitration before the "Joint Conference Committee" pursuant to the arbitration provisions of the collective bargaining agreement. Nevertheless, Local L-109 and Mr. Dean Puthuff (Business Manager for Local L-109) refused to arbitrate the instant dispute before the "Joint Conference Committee," and instead induced and encouraged Matson Plastering's workmen to engage in strike activity.

Therefore, on June 5, 1980, Matson Plastering filed with the United States District Court For The Eastern District of California a Complaint For Injunction, a Temporary Restraining Order, Order To Show Cause Re Preliminary Injunction, and permanent injunction compelling Local L-109 to arbitrate the disputed penalty assessment and simultaneously restraining Local L-109 from engaging in

strike activity pending said arbitration. On that same date, the District Court issued the requested Temporary Restraining Order, and on June 16, 1980, the District Court issued the requested Preliminary Injunction.

Thereafter, on or about July 11, 1980, Local L-109 and Dean Puthuff appealed the District Court's judgment to the United States Court of Appeals for the Ninth Circuit. On or about April 7, 1981, after all parties submitted their opening briefs to the Ninth Circuit, Local L-109 and Dean Puthuff filed with the Ninth Circuit Court of Appeals a Motion For Summary Reversal of the District Court's decision on the ground that the factual and legal issues presented to the Ninth Circuit Court of Appeals for review were governed by the Ninth Circuit Court of Appeals' above-mentioned prior December 12, 1980 judgment in *Matson Plastering v. Local 295*. On April 30, 1981, the Ninth Circuit granted said motion relying upon its above-mentioned prior December 12, 1980 decision in *Matson Plastering v. Local 295*, wherein the Ninth Circuit Court of Appeals held that since Local 295 disputed whether its strike was over an arbitrable issue and was in violation of a no strike clause, the District Court had no jurisdiction to enjoin said strike and/or order arbitration.

IV

ARGUMENT

As explained in more detail below, the Ninth Circuit committed legal error for the following reasons.

In both of the above cases the union's grievance with Matson Plastering is subject to the arbitration clause and

no strike clause of the respective collective bargaining agreements. While it is true that each union disputes this fact, that alone should not deprive the District Court of jurisdiction to resolve said dispute by making a determination whether the grievance is in fact subject to the no strike clause and arbitration clause. If the District Court is deprived of such jurisdiction, arbitration provisions and no strike provisions become utterly unenforceable by the Courts, and their effectiveness is then left entirely to the voluntary compliance of the parties. Such a result completely eliminates the limited anti-injunction exception to the Norris La-Guardia Act created by *Buffalo Forge* and *Boys Market*, and it defeats public policy favoring peaceful settlement of labor disputes by arbitration rather than by self help measures such as strikes. Employers and unions will have no reason to include arbitration and no strike provisions in collective bargaining agreements in the future if said provisions are unenforceable by the Courts.

A. Regarding Matson Plastering v. Local 295

1. The Dispute Between Matson Plastering And Local 295 Is Subject To The Arbitration Clause And No Strike Clause Of The Collective Bargaining Agreement

A Federal District Court may enjoin a strike resulting from a dispute which is subject to arbitration under a collective bargaining agreement. Labor-Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a); *Boys Market v. Retail Clerks' Union* (1970) 398 U.S. 325; *A. I. Gage Plumbing Supply v. Local 300 of the Int'l Hod Carriers Etc. Union* (1962) 202 C.A.2d 197; *Grunwald-Marx,*

Inc. v. Los Angeles Joint Board Amalgamated Clothing Workers of America (1959) 52 Cal.2d 568; *McCarroll v. Los Angeles County, Etc. Carpenters* (1957) 49 Cal.2d 45; *C. F. Charles Dowd Box Co., Inc. v. Courtney* (1962) 368 U.S. 502.

The underlying dispute between Matson Plastering and Local 295 involves (1) the legality of Local 295's assessment of penalties against Matson Plastering, and (2) the legality of Local 295's strike activity as a result of Petitioner's failure to pay the assessed penalties.

In order to resolve each above-mentioned issue it is necessary to determine when the collective bargaining agreement became effective. If it became effective in the Fall of 1979, as claimed by Local 295, then Local 295 would have a plausible argument that it had the right to assess penalties against Matson for failure to timely pay trust fund contributions (see Article XIII, § 1, of the collective bargaining agreement at Appendix "G"), and to strike for Matson's failure to pay these assessed penalties. (See Article XIII, § 2, of the collective bargaining agreement at Appendix "G"). However, if the collective bargaining agreement did not become effective until February 1, 1980, as claimed by Matson Plastering, then Local 295 has no right to assess penalties or go on strike as a result of Matson Plastering's failure to pay those penalties.

Thus, the essential underlying dispute between the parties is this: *When did the collective bargaining agreement become effective?* That dispute constitutes a question concerning the interpretation of the collective bargaining agreement. Article XIV, § 2 of the collective bargaining

agreement clearly provides that all disputes involving the interpretation of the collective bargaining agreement must be settled by arbitration. Thus, the dispute is subject to mandatory arbitration and the District Court properly enjoined the strike pending arbitration.

2. The Dispute Between Matson Plastering And Local 295 Is Not Excluded From The Arbitration Clause And No Strike Clause

Local 295 argues that the District Court should not have enjoined the strike since, allegedly, Article XIV, § 2(f) and Article XIII, § 2 of the collective bargaining agreement reserves to the Union the right to strike for an employer's failure to pay penalty assessments. Respondent relies on *Martin Hageland, Inc. v. District Court* (9th Cir., 1972) 460 F.2d 789; *Stone & Webster Engineering Corp. v. Local 38* (D.N.Y. 1978) 461 F.Supp. 882; *Associated General Contractors v. Illinois Conference of Teamsters* (7th Cir., 1972) 454 F.2d 1324 (holding that where the union has expressly reserved the right to strike over a grievance, injunctive relief is inappropriate).

Respondent Local 295's argument, however, is misplaced.

Contrary to Local 295's contention, Article XIV, § 2(f) does not reserve to the union the right to strike over an employer's failure to pay penalty assessments. Rather, Article XIV, § 2(f) reserves to Local 295 only the right to strike over an employer's refusal to make trust fund contributions. However, Local 295's strike activity is not the result of Matson Plastering's failure to make trust fund contributions (since Matson did make such trust fund con-

tributions). Rather, Local 295's strike activity is the result of Matson's failure to pay the assessed penalties. Thus, Local 295 cannot rely on Article XIV, § 2(f) as an exception to the arbitration clause and/or no strike clause.

Article XIII, § 2 is the only provision within the collective bargaining agreement which reserves to Local 295 the right to strike over an employer's failure to pay penalty assessments. However, Local 295 cannot rely on Article XIII, § 2 as an exception to the arbitration clause and/or no strike clause because Article XIII, § 2 reserves to the union the right to strike only if an employer fails to pay penalties which were assessed *during the term* of the instant collective bargaining agreement. Local 295, however, struck as a result of Matson Plastering's faillure to pay penalties assessed *prior* to the effective date of the instant collective bargaining agreement. Local 295 has never filed any affidavit or declaration contesting this fact. Thus, since the penalties were not assessed during the term of the collective bargaining agreement, Local 295 cannot rely on Article XIII, § 2 as an exception to the no strike clause and/or arbitration clause.

B. Regarding Matson Plastering v. Local L-109

1. The Dispute Between Matson Plastering And Local L-109 Is Subject To The Arbitration Clause And No Strike Clause Of The Collective Bargaining Agreement

The underlying dispute between Matson Plastering and Local L-109 involves whether Matson Plastering is obligated to pay the penalties assessed by the "Joint Conference Board." This dispute is subject to Article XX, §§ 1

through 7 of the collective bargaining agreement which requires Local L-109 to arbitrate "all disputes, differences, and grievances" before the "Joint Conference Committee."

At no time has Local L-109 ever submitted this dispute to arbitration. Rather, when Matson Plastering refused to pay the penalty assessed by the "Joint Conference Board", Local L-109 simply engaged in strike conduct in violation of the arbitration clause and the no strike clause contained within the collective bargaining agreement.

Local L-109 cannot argue that it complied with the arbitration procedures of the collective bargaining agreement by submitting its claim for penalties to the "Joint Conference Board." This is because the "Joint Conference Board" had no authority to arbitrate any dispute under the collective bargaining agreement. Rather, only the "Joint Conference Committee" had such authority.

As noted above, the "Joint Conference Board" (who assessed the penalty) and the "Joint Conference Committee" (referred to in the collective bargaining agreement as the arbitrator) are two completely separate entities. The "Joint Conference Committee" (the arbitrator) is composed of three employer representatives, and three representatives of Local L-109. On the other hand, the "Joint Conference Board" does not have any em› ›yer representatives, and it does not have three representatives of Local L-109. Rather, it is composed only of three representatives of three different unions including Local L-109, Plasterers Local Union No. 295, and Hod Carriers Local Union No. 262, respectively. Very simply, the wrong entity imposed the $775.78 fine on Matson Plastering.

Even if, *assuming arguendo*, the "Joint Conference Board" and the "Joint Conference Committee" were one and the same entity, nevertheless that entity failed to follow the arbitration procedures set forth within the collective bargaining agreement. This is because that entity failed to give Matson Plastering any notice or opportunity to appear and present evidence at a hearing as required under Article XX, § 7(a)-(j) of the collective bargaining agreement.

Thus, since the instant dispute is subject to compulsory arbitration before the "Joint Conference Committee" which Local L-109 failed to exhaust and/or comply with, the District Court properly enjoined Local L-109's strike activities pending arbitration.

2. The Dispute Between Matson Plastering And Local L-109 Is Not Excluded From The Arbitration Clause Or No Strike Clause

Local L-109 and Dean Puthuff claim that the instant dispute was not arbitrable because the dispute allegedly falls within two exceptions to the arbitration clause of the collective bargaining agreement.

First: Local L-109 and Dean Puthuff claim that Article XVI, § 3(e) (see Appendix "I") of the collective bargaining agreement permits the union to remove employees from any job whenever the employer fails to pay trust fund contributions. However, Local L-109's strike did not result from Matson Plastering's failure to pay trust fund contributions. Rather, the strike resulted because Matson Plastering refused to pay a penalty assessment (the trust fund contribution had already been paid by Matson Plastering

when Local L-109 went on strike). Thus, Local L-109 cannot rely on Article XVI, § 3(e) of the collective bargaining agreement as an exception to the arbitration clause or no strike clause.

Second: Local L-109 and Dean Puthuff claim that Article XX, § 7(h) of the collective bargaining agreement provides that where an employer fails to abide by the decision of the "Joint Committee" the union may then strike. Local L-109 and Dean Puthuff argue that since Matson Plastering failed to pay the penalty assessed by the "Joint Conference Board," the union is therefore privileged to strike.

Said argument is absurd. As noted above, the "Joint Conference Board" and the "Joint Conference Committee" are two separate entities. The "Joint Conference Committee" (referred to in the collective bargaining agreement as the proper arbitrator) has never arbitrated the instant dispute. Local L-109 has never submitted any affidavits or declarations to the contrary.

Moreover (as mentioned above), even if, *assuming arguendo,* the "Joint Conference Board" and the "Joint Conference Committee" are the same entity, that entity failed to follow the arbitration procedures of the collective bargaining agreement because it failed to give Matson Plastering any notice or opportunity to appear and present evidence at a hearing.

Thus, the instant dispute is subject to the arbitration clause and no strike clause of the collective bargaining agreement, and it does not fall within any exception thereto. The District Court therefore properly enjoined the strike and ordered arbitration.

C. The Ninth Circuit Court Of Appeals Misconstrued The Holding Of Buffalo Forge

The December 12, 1980 opinion of the Ninth Circuit Court of Appeals construed *Buffalo Forge* as setting forth the rule that—in order for a Federal District Court to enjoin a strike, it must be "undisputed" that the grievance underlying said strike falls within an arbitration clause and/or a no strike clause contained in a collective bargaining agreement. Based on that construction, the Ninth Circuit distinguished *Buffalo Forge* and *Boys Market* on the grounds that in *Boys Market* the applicability of the no strike clause was "undisputed" and therefore an injunction properly issued; whereas in *Buffalo Forge*, the union "disputed" the applicability of the no strike clause and therefore the request for injunction was denied.

In applying its above construction of *Buffalo Forge*, the Ninth Circuit held that since Local 295 and Local L-109 each "disputed" the applicability of the no strike clause and/or arbitration clause contained within the respective collective bargaining agreements, the instant matters were controlled by *Buffalo Forge* (rather than *Boys Market*) and the District Court therefore had no jurisdiction to enjoin the strike.

Matson Plastering respectfully submits that neither *Boys Market* nor *Buffalo Forge* requires (as a condition precedent to enjoining a strike) that the applicability of the no strike clause and/or arbitration clause be undisputed by the

union.[2] The distinction between *Boys Market* and *Buffalo Forge* did not turn on whether the applicability of the no strike clause was disputed or undisputed. Rather, the distinction turned on whether the strike grew out of a dispute between the parties to the collective bargaining agreement and whether the parties had agreed to arbitrate that dispute.

In *Boys Market* an injunction was granted because there, the strike resulted from a dispute between the parties to the collective bargaining agreement, and said dispute fell within the arbitration clause of that collective bargaining

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[2] In *Boys Market*, the United States Supreme Court found only that there was . . . "no dispute that the grievance in question was subject to *adjustment and arbitration* under the collective bargaining agreement." (See 398 U.S. 235 at p. 254). *Boys Market* did not find that the union failed to contest the applicability of the no-strike clause. However, in finding there was no dispute regarding the applicability of the arbitration clause, *Boys Market* did not set forth any requirement that (as a condition precedent to enjoining a strike) the union must admit the applicability of the arbitration clause. See, *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974), where an injunction issued to enforce a no strike clause despite the uncertainty over the arbitrability of the dispute.

Further, to require (as a condition precedent to enjoining strikes) that the union admit the applicability of the arbitration clause (or the no strike clause) removes from the District Court all jurisdiction to determine whether the dispute is even arbitrable. If the applicability of the arbitration clause (or no strike clause) is disputed, the District Court should retain jurisdiction to order the dispute arbitrated, and simultaneously enjoin the strike pending the results of that arbitration. In this manner, the District Court does not determine the merits of the underlying dispute, but rather merely enforces the parties' agreement to settle the dispute by arbitration rather than by striking.

agreement. In *Buffalo Forge*, however, this was not the case.

In *Buffalo Forge*, the only reason why an injunction was denied was because (unlike *Boys Market*) the strike did not arise out of any dispute between the parties to the collective bargaining agreement. Rather, *Buffalo Forge* involved a *sympathy strike*. There, the employees struck not because of any dispute they had with their employer; but rather they struck in sympathy with different employees who had a dispute with a different employer under an entirely different collective bargaining agreement. *Buffalo Forge* concluded that since the sympathy strike did not involve any underlying grievance between the parties to the collective bargaining agreement, the District Court had no jurisdiction to enjoin that sympathy strike.

The instant matters are distinguishable from *Buffalo Forge* because they do not involve sympathy strikes. Rather, the instant strikes were precipitated by a dispute between the parties to the respective collective bargaining agreements. And (as noted above) said disputes fall within the applicable arbitration clauses of those collective bargaining agreements.

Buffalo Forge itself was careful to point out that a District Court retains jurisdiction to enjoin a strike if (1) that strike was precipitated by a dispute between the parties to the collective bargaining agreement, and (2) the dispute was arbitrable under said collective bargaining agreement. (At 428 U.S. 397 at p. 406). In other words, *Buffalo Forge* requires only that the strike arise out of a dispute which

the parties have agreed to arbitrate. This is the situation in the instant matters.

Further, both *Boys Market* and *Buffalo Forge* recognize that the employer's promise to arbitrate is the quid pro quo for the union's promise not to strike. Each promise is mutually dependent on the other. The purpose of the parties' agreement to arbitrate is to provide a peaceful settlement of disputes without resorting to self-help measures such as strikes. Under both *Boys Market* and *Buffalo Forge*, to the extent that an injunction furthers Federal Congressional policy favoring peaceful settlement of disputes, an injunction does not violate the policies of the Norris-La Guardia Act. Thus, whenever an injunction furthers peaceful settlement of disputes, it is not barred by the Norris-La Guardia Act. In the instant cases, enjoining the above-mentioned strikes furthers peaceful settlement of the underlying disputes.

In a typical strike situation (as existed in *Boys Market* case, and as exists in the instant cases), if the District Court is allowed to order arbitration without simultaneously enjoining the strike,[3] the union obtains the benefits of its bargain (since the employer is obligated to arbitrate), while the employer forfeits the benefits of its bargain (since the union is allowed to continue its strike).

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[3] As mentioned above, although the Ninth Circuit Court of Appeals held that the District Court did not have jurisdiction to enjoin the strike, it nevertheless retains jurisdiction to order arbitration. The Ninth Circuit remanded the matter of *Matson Plastering v. Local 295* to the District Court for a determination of whether the instant disputes are arbitrable.

Such a result in unfair; it is inconsistent with the parties' intent to arbitrate; and it is inconsistent with public policy favoring arbitration as the preferred method for settling disputes. Further, if the employer is required to arbitrate without the union being enjoined from striking, the union's strike necessarily coerces the employer into capitulating on the grievance before or outside the arbitration thereby rendering the arbitration meaningless. By allowing Local 295 and/or Local L-109 to strike, said unions are free to coerce Matson Plastering into capitulating on the grievances before or outside arbitration. The arbitration process is thereby rendered meaningless because it does not further the policy favoring peaceful settlement of disputes. In this sense, the instant case (and *Boys Market*) is distinguishable from *Buffalo Forge*.

The only reason why an injunction was prohibited in *Buffalo Forge* (i.e., the sympathetic strike setting) was because in a sympathetic strike situation an injunction does not further the peaceful settlement of disputes through arbitration. In *Buffalo Forge*, the union's strike did not coerce the employer into capitulating over a grievance. This was because (in *Buffalo Forge*) the dispute underlying the strike did not exist between the parties to the collective bargaining agreement (rather the underlying dispute existed between a different employee unit and employer under a wholly different collective bargaining agreement). Thus, in a sympathetic strike setting, the strike does not coerce the employer to comply with union demands. Consequently, arbitration remains meaningful despite the continuation of the strike.

Further, to prevent injunctive relief simply because the union "disputes" the applicability of a no strike clause and/or arbitration clause (regardless of how frivolous the union's claim may be) undermines Federal Congressional policy favoring peaceful settlement of disputes by arbitration rather than by striking (especially where it is determined that the dispute is in fact arbitrable) without furthering the policies of the Norris-La Guardia Act.

Although Local 295 and Local L-109 have each taken the position that their strikes fall within an exception to the arbitration clause and no strike clause of their respective collective bargaining agreements, nevertheless neither Local 295 nor Local L-109 ever once filed any affidavit or declaration in support of their positions. On the contrary, Local 295 and Local L-109's attorney represented to the Federal District Court For The Eastern District and the Ninth Circuit Court Of Appeals that Local 295 and/or Local L-109 may in fact be liable in damages to Matson Plastering for engaging in the strike, but (contends Local 295 and Local L-109) nevertheless the Court should not enjoin said strike no matter how wrongful it is. Local 295 and Local L-109 should not be allowed to avoid an injunction simply by frivolously claiming (without any supporting affidavit or declaration) that the respective no strike clauses and/or arbitration clauses are inapplicable to the instant disputes. Local 295 and Local L-109 should be required to at least make a good faith effort to put forth admissible evidence supporting their contentions. In this case, no such effort was made.

It is well settled that (because of judicial and congressional policies favoring peaceful resolution of labor disputes through arbitration rather than strikes), there is a rebuttable presumption that disputes giving rise to strikes fall within the applicable arbitration and/or no strike clauses of collective bargaining agreements; and the burden of rebutting that presumption rests on the party resisting arbitration. [See, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-3 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); and *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974)].[4] In the instant case, since Local 295 and Local L-109 have failed to put forth any evidence rebutting the presumption of arbitrability of the instant dispute, this Honorable Court should reverse the Ninth Circuit Court of Appeals' holdings and order Local 295 and Local L-109 to cease their strike activity and arbitrate the underlying dispute.

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[4] In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-3 (1960), the United States Supreme Court stated . . . "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

The Ninth Circuit Court of Appeals has found that it is "not clear" whether the underlying grievance is subject to the arbitration and no strike clauses of the respective collective bargaining agreements. Thus, the Ninth Circuit committed legal error by failing to resolve said doubt in favor of coverage.

D. Local 295 And Local L-109 Have Not Raised Any Dispute Regarding Whether Their Grievances Are Subject To The Respective Arbitration And No Strike Clauses

Even if this Honorable Court adopts the Ninth Circuit Court of Appeals' December 12, 1980 holding that in order for a Federal District Court to enjoin a strike, it must be "undisputed" that the strike is over an arbitrable issue and is in violation of a no strike clause, nevertheless, this Court should also find that both Local 295 and Local L-109 have failed to raise any such dispute in the instant case. This is because (as noted above) Local 295 and Local L-109 failed to introduce any evidence in support of their positions by affidavit or declaration.

If a union is not required to put forth any evidence in support of its contention that the no strike clause and/or arbitration clause is inapplicable, unions will thereby have the ability to render District Courts powerless to issue *Boys Market* injunctions simply by disputing the applicability of the no strike clause and/or arbitration clause no matter how frivolous and unsupported the union's argument may be. This Honorable Court's holding in *Boys Market* will then be without substance.

V

CONCLUSION

Petitioner Matson Plastering Co., Inc. respectfully prays that this Honorable Court grant this Petition For Writ Of Certiorari and reverse the Ninth Circuit Court of Appeals' December 12, 1980 Judgment and April 30, 1981 Judgment, and thereby affirm the District Court's Orders restraining Respondents Local 295 and Local L-109 from engaging in strike activity and directing the parties herein to arbitrate their respective disputes.

Dated: May 14, 1981.

Respectfully submitted,

THOMAS E. CAMPAGNE
THE LAW FIRM OF
THOMAS E. CAMPAGNE
A PROFESSIONAL CORPORATION
Attorneys for Petitioner

(Appendices Follow)

Appendix A

United States District Court
For the Eastern District of California
At Fresno

Case No. CV-80-92-MDC

Matson Plastering Co., Inc., a California Corporation,

Plaintiff,

v.

Operative Plasterers and Cement Masons International Association, AFL-CIO, Plasterers Local Union No. 295, an unincorporated association, and Everett Martin, individually and as an agent of Local 295,

Defendants.

[Filed May 12, 1980]

PRELIMINARY INJUNCTION

The above matter was heard on May 5, 1980, pursuant to the Order To Show Cause issued April 28, 1980. The Law Firm of Thomas E. Campagne, a Professional Corporation by Thomas E. Campagne appeared as attorney for Plaintiff; and the law firm of Van Bourg, Allen, Weinberg & Roger by David Rosenfeld appeared as attorney for both Defendants. All parties having been given a full op-

portunity to present evidence, the matter having been fully argued and submitted, and proof being made to the satisfaction of this court good cause appearing,

IT IS ORDERED that Plaintiff's application for preliminary injunction against individual Defendant Everett Martin is hereby denied due to the Plaintiff's failure to serve him in his individual capacity with Summons and Order To Show Cause prior to the hearing on said Order To Show Cause.

IT IS FURTHER ORDERED that Defendant OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO, PLASTERERS LOCAL UNION NO. 295 (hereinafter referred to as Defendant Local 295), and its officers, agents, representatives, employees and members and each and every and all other persons acting at the direction of or in concert with Defendant Local 295 shall immediately be enjoined and restrained from engaging in any of the following activities during the pendency of this action, or until further order of this court:

(a) Directing or ordering or otherwise inducing, the employees of Plaintiff not to perform work for Plaintiff;

(b) Picketing at Plaintiff's job site where the effect of such picketing is to induce, encourage, or cause Plaintiff's employees not to work for Plaintiff;

(c) Engaging in any activity for the purpose of causing, or with the effect of causing, a stoppage of work for, or strike against, Plaintiff's job site;

(d) Maintaining in effect any orders or directions to employees of Plaintiff that said employees should engage in a cessation of work at Plaintiff's job site;

(e) Threatening the employees of Plaintiff with fines or other punishment unless such employees engage in a work stoppage at Plaintiff's job site;

(f) Refusing to use best efforts to furnish the required number of qualified and competent workmen to Plaintiff as provided in the collective bargaining agreement currently in effect covering Plaintiff and Defendant.

IT IS FURTHER ORDERED that Defendant Local 295 shall participate in any contractual grievance proceeding which is properly subject to the contractual grievance procedure set forth in Article XIV, Section 2 of the collective bargaining agreement currently in effect by and between Plaintiff and said Defendant and which involves the present underlying dispute.

IT IS FURTHER ORDERED that Plaintiff shall continue furnishing a surety bond in the sum of $2,000.00.

Dated: May 8, 1980

M. D. CROCKER

M. D. Crocker
U.S. District Court Judge

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 80-4277
D.C. #CV-80-92

Matson Plastering Co., Inc.,
Plaintiff-Appellee,

vs.

Operative Plasterers and Cement Masons International Association, AFL-CIO, Plasterers Local Union No. 295
Defendant-Appellant.

[Filed December 12, 1980]

OPINION

Appeal from the United States District Court
for the Eastern District of California
M.D. Crocker, J., presiding
Argued and Submitted November 13, 1980

Before: KENNEDY, SCHROEDER, and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

The issue for decision is whether the district court had jurisdiction to issue a preliminary injunction against a strike by the Operative Plasterers and Cement Masons In-

ternational Association, Local 295 (the Union). The Union claims that the court lacked jurisdiction under applicable provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* Matson Plastering Co., Inc. (the Employer) claims that the district court had jurisdiction under the exception to the Norris-LaGuardia Act established in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

As this court has stated before,

> The Norris-LaGuardia Act contains severe strictures against the issuance of injunctions in cases involving or growing out of labor disputes. 29 U.S.C. §§ 104, 113(c).
>
> The clear command of this Congressional enactment restricts the jurisdiction of the federal courts.

Martin Hageland, Inc. v. United States Dist. Ct. Cent. Dist., Cal., 460 F.2d 789, 791 (1972).

Boys Markets carved out a narrow exception to these strictures. It overruled prior case law (*Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)) and held that the Norris-LaGuardia Act did not prohibit an injunction to enforce an undisputed contractual obligation not to strike and to submit to binding arbitration. Absent such a clear contractual duty, *Boys Markets* "leaves the strictures of the Norris-LaGuardia Act undisturbed." *Martin Hageland, Inc.*, 460 F.2d at 791.

The narrowness of the *Boys Markets* exception became clearer in *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976). In *Buffalo Forge* the employer sought a *Boys Market* injunction against a sympathy strike on the ground that it was prohibited under

the collective bargaining agreement's no-strike clause. The Court distinguished between the situation in *Boys Markets*, where it was undisputed by the parties that the work stoppage violated the no-strike clause of the bargaining agreement, and the situation in *Buffalo Forge*, where this was precisely the underlying contract dispute. The Court held that the district court had no jurisdiction to consider the merits of the underlying dispute over the proper interpretation of the contract. The district court's jurisdiction in *Buffalo Forge* was limited to deciding whether the dispute over contract interpretation was arbitrable under the bargaining agreement. Most importantly, the Court held that in a *Buffalo Forge* type case a district court may not issue an injunction pending the arbitrator's decision where it is not clear whether the strike is over an arbitrable issue and is in direct violation of a no strike clause.

> [An injunction pending the decision by the arbitrator] would cut deeply into the policy of the Norris-La Guardia Act and make federal courts potential participants in a wide range of arbitrable disputes under the many existing and future collective bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets*, but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are the subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act.

428 U.S. at 410-11

We think that the instant appeal falls squarely within the analytic framework of *Buffalo Forge*. The Union struck over the Employer's refusal to pay an assessment of $775.78 levied against it by the Union for late payment of

contributions to a Union trust fund. The Union argues that the work stoppage did not violate the collective bargaining agreement's no-strike clause because of an express exception reserving the right to strike for non-payment of such contributions. The Employer counters with arguments why the work stoppage did violate the no-strike clause.

Thus, as in *Buffalo Forge*, the Union and Employer are in dispute over whether the Union's strike action is barred by the no-strike clause of their bargaining agreement. *Buffalo Forge* makes clear, we think, that this question of contract interpretation was not within the district court's jurisdiction to consider. The only issue the district court could address in the case at hand is the preliminary one of whether the parties are bound, under their bargaining agreement, to submit to arbitration the question of the strike's legitimacy. Equally true under *Buffalo Forge* is that where it is not clear that the strike is over an arbitrable issue and is in violation of a no strike clause, the district court has no jurisdiction to enjoin strike activity pending the arbitrator's decision. Only if the arbitrator determined that the no-strike clause barred the strike would the *Boys Markets* exception permit an injunction against continued strike activity.

We note that here, unlike in *Buffalo Forge*, the Union has so far refused to arbitrate the issue of the no-strike clause's applicability. As the Supreme Court made clear in *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974) and reemphasized, albeit in dictum, in *Buffalo Forge*, 428 U.S. at 405, a district court may, if it finds a dispute to be

arbitrable under the parties' collective bargaining agreement, order the parties to engage in arbitration.

Under *Buffalo Forge*, the district court had no jurisdiction to issue an injunction against the Union's strike. We vacate the injunction, therefore, and remand to the district court for a determination of whether or not the parties are obligated, under the collective bargaining agreement, to submit to arbitration the issue of the no-strike clause's applicability. If the court determines that they are so obligated, it may order the parties to arbitrate forthwith.

The injunction is therefore VACATED, and the case REMANDED to the district court for further proceedings consistent with this opinion.

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 80-4277

Matson Plastering Co., Inc.,
Plaintiff-Appellee,

vs.

Operative Plasterers and Cement Masons International Association, AFL-CIO, Plasterers Local Union, No. 295,
Defendant-Appellant.

[Filed March 9, 1981]

ORDER

Before: KENNEDY, SCHROEDER and NORRIS, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing in banc.

The full court has been advised of the petition for rehearing in banc and no judge of the court has requested a vote thereon. Fed. R. App. P. 35(b).

The petition for rehearing in banc is denied.

Appendix D

United States District Court
for the Eastern District of California
at Fresno

Case No. CV-F-80-124MDC

Matson Plastering Co., Inc., a California Corporation,

Plaintiff,

vs.

Lathers' Local Union No. 109 of the Wood, Wire and Metal Lathers International Union, AFL-CIO, d/b/a United Brotherhood of Carpenters and Joiners of America, Lathers' Union Local No. 109-L, an unincorporated association, and Dean Puthoff, individually, and as an agent of Local 109-L,

Defendants.

[Filed July 1, 1980]

PRELIMINARY INJUNCTION

The above matter was heard on June 16, 1980, pursuant to the Order To Show Cause issued June 5, 1980. The Law Firm of Thomas E. Campagne, a Professional Corporation by Thomas E. Campagne appeared as attorney for Plaintiff; and the law firm of Van Bourg, Allen, Weinberg & Roger by David Rosenfeld appeared as attor-

ney for both Defendants. All parties having been given a full opportunity to present evidence, the matter having been fully argued and submitted, and proof being made to the satisfaction of this court and good cause appearing,

IT IS ORDERED that Plaintiff's application for preliminary injunction against individual Defendant DEAN PUTHOFF and Defendant LATHERS' LOCAL UNION NO. 109 OF THE WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION, AFL-CIO, d/b/a UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LATHERS' UNION LOCAL NO. 109-L (hereinafter referred to as Defendant Local 109-L), and its officers, agents, representatives, employees and members, and each and every, and all other persons acting at the direction of or in concert with Defendant Local 109-L, and Defendant Dean Puthoff, shall immediately be enjoined and restrained from engaging in any of the following activities during the pendency of this action, or until further order of this court:

(a) Directing or ordering or otherwise inducing, the employees of Plaintiff not to perform work for Plaintiff;

(b) Maintaining in effect any orders or directions to employees of Plaintiff that said employees should engage in a cessation of work at Plaintiff's job site;

(c) Threatening the employees of Plaintiff with fines or other punishment unless such employees engage in a work stoppage at Plaintiff's job site;

(d) Refusing to use good faith efforts to furnish the required number of qualified and competent workmen to

Plaintiff as provided in the collective bargaining agreement currently in effect covering Plaintiff and Defendants.

IT IS FURTHER ORDERED THAT Defendant Local 109-L shall participate in any contractual grievance proceeding which is properly subject to the contractual grievance procedure set forth in Article XX, Sections 1 through 7 of the collective bargaining agreement currently in effect by and between Plaintiff and said Defendant and which involves the present underlying dispute.

IT IS FURTHER ORDERED that Plaintiff shall continue furnishing a surety bond in the sum of $5,000.00.

DATED: July ...., 1980.

M. D. CROCKER

M. D. Crocker,
U.S. District Court Judge

Appendix E

United States Court of Appeals
for the Ninth Circuit

No. 80-4371
D.C. No. CV80-124 MDC
EASTERN CALIFORNIA

Matson Plastering Company, Inc., a California corporation,
Plaintiff/Appellee,

vs.

Lathers' Local Union # 109 of the Wood, Wire & Metal Lathers International Union, AFL-CIO, dba United Brotherhood of Carpenters & Joiners of America, Lathers' Union Local # 109-L, an unincorporated association, and Dean Puthoff, individually and as an agent of Local 109-L,
Defendants/Appellants.

ORDER

[Filed April 30, 1981]

Before: WRIGHT and KENNEDY, Circuit Judges.

Upon due consideration, appellants' motion for summary reversal is granted. *See Matson Plastering Co. v. Local Union No. 295,* 633 F.2d 1307 (9th Cir. 1980).

Appendix F

ARTICLE XII, FRINGE BENEFITS

Section 1. The parties agree that they have established and will maintain a Vacation Fund, Health and Welfare Fund and Pension Fund for all employees covered by this Agreement. Each Employer covered by or signatory to this Agreement agrees to, and shall be bound by, all the terms, conditions and provisions of those certain trust agreements thereto hereafter made creating:

(a) The Northern California Plasterers Health and Welfare Trust Fund and shall pay and contribute:

(1) Effective July 1, 1979 .....$1.21 per hour

(b) The Northern California Plastering Industry Pension Trust Fund and shall pay and contribute:

(1) Effective July 1, 1979 .....$2.15 per hour

(c) The Sacramento Valley Vacation Trust Fund and shall pay and contribute:

(1) Effective July 1, 1975 .....$1.00 per hour

for each hour worked by each employee employed on work covered by this Agreement. The payments and contributions that are provided for herein shall be made in accordance with the applicable trust agreement and regulations prescribed by the Board of Trustees of the applicable Trust Contributions shall be made on monthly report forms provided by the Trustees.

At such time that a Northern California Vacation Trust Fund is established the employers shall remit to the newly formed Trust Fund when so notified by the Union.

The contributions to the Vacation Fund, Dues Check-off and Union Activity Fund shall be deducted from the net pay of each employee.

(1) Dues Check-off effective July 1, 1979.....
.....18¢ per hour

(2) Union Activity Fund effective July 1, 1975.....
.....05¢ per hour

Section 2. The parties agree that they have established and will maintain a promotional program which is, and shall be known as, the Sacramento Valley Bureau for Lath and Plaster, Inc., established in accordance with all applicable State and Federal corporate laws, and all signatory employers agree to contribute Ten (.10) Cents per hour for each hour worked by all employees employed on work covered by this Agreement. All signatory employers further agree to contribute Four (.04) Cents per hour for each hour worked by all employees employed on work covered by this Agreement into the Industry Fund.

Appendix G

ARTICLE XIII, TIME FOR PAYMENT TO ALL FUNDS

Section 1. The payments provided for herein are due and payable on or before the tenth (10th) day of the current month and are for hours worked in the preceding month. Contributions shall be made on a reporting form provided by the trustees and must be filled in properly. Payments not received by the twentieth (20th) day of the current month shall thereupon become delinquent and such delinquent employer shall be assessed an amount equal to ten (10%) percent of the delinquent payment, but in no event less than Twenty ($20.00) Dollars per Fund per month as liquidated damages for the additional expense resulting from the delinquency. Postmarks will not be accepted as having been received by the twentieth (20th) day of the current month. Whenever the twentieth (20th) day of the month falls on Saturday, Sunday or holidays, the following business day shall be acceptable as being received. Remittance checks not honored by the bank on the initial deposit for reason of "insufficient funds" shall be considered as non-payment and the employer declared delinquent.

Any employer who is signatory to this Agreement and becomes delinquent in the payment of wages, travel pay, fringes and/or assessed penalties in another area not covered by this Agreement, the Union may remove employees from any shop or job of any individual delinquent employer, and refuse to furnish employees to said delinquent employer until full payment has been made.

Any employer who becomes signatory to this Agreement and is owing wages, travel pay, fringes and/or assessed penalties in another area not covered by this Agreement, the Union may remove employees from any shop or job of any individual delinquent employer, and refuse to furnish employees to said delinquent employer until full payment has been made.

Section 3. In cases relative to dispute over the payment of wages and/or fringe benefits, at the recommendation of the Joint Conference Board and upon notice in writing from the joint Conference Board, an individual employer must permit a representative or representatives (including an accountant) of the Joint Conference Board to enter upon the premises of such individual employer during business hours, at all reasonable time or times and to examine and copy reports of such individual employer as may be necessary to determine whether the individual employer is making full and prompt payment of all sums required to be paid by him to the various Trust Funds and/or wages. In the event that such an examination reveals that such employer is not making full and prompt payments of all sums required to be paid by him to the various Trust Funds and/or wages, then, and in that event, such individual employer shall pay such cost, including accountant fees, as may have been reasonably incurred in making such determination. Upon the written request of the Joint Conference Board of their duly authorized representative, such employer records shall be audited at the office of Trust Fund in question.

Appendix H

ARTICLE XIV, GRIEVANCE PROCEDURE

Section 1. During the term of this Agreement and so long as neither party is in violation of any of the provisions of this Agreement, there shall be no strike or lockouts.

Section 2. If, during the term of this Agreement, a bona fide question arises concerning the interpretation of this Agreement, the parties agree to settle such dispute as follows:

(a) In the event that any grievance or dispute arises, excepting those set forth, between the Locals or their members and the employers, which cannot within twenty-four (24) hours be amicably settled between the Local and the Employer, a Joint Conference Board shall be created for the settlement of such disputes or grievances. Said Joint Conference Board shall be composed of two (2) representatives selected by the Union and two (2) representatives selected by the Employers.

(b) Said Board shall organize at once and elect a Chairman and a Secretary and shall adopt the rules of procedure which shall bind employers, Union and their members.

(c) Said Board shall have the power to adjust any differences of any character that may arise regarding the meaning or enforcement of this Agreement. If the Board, within twenty-four (24) hours after such meeting cannot agree upon the decision to be rendered on the matter referred to it, the members of the Board shall choose a fifth member who shall have no business or financial connection

with either party to this Agreement. The decision of the Board shall be determined by the majority of its members and shall be rendered in writing within five (5) days after the selection of the fifth member. Any decision rendered by said Board shall be final, conclusive and binding on employers, Union and their members.

(d) Pending such decision, work shall be continued under the status quo prior to the time of the dispute. Any decision so rendered by the Board shall be immediately placed into effect and work thereafter continued in accordance with the Agreement and provisions of such decision.

(e) Each party shall bear the expense of the members of the Board selected by it, and the expenses of the fifth member of said Board shall be borne equally by the parties hereto.

(f) Notwithstanding any provisions in the Agreement to the contrary, no dispute, complaint or grievance arising out of the failure or refusal of an employer to comply with the Union Security and hiring hall, wages, transportation, health and welfare, pension, vacation, fringe benefits or other remuneration shall be subject to the grievance or arbitration provisions of this contract. It shall not be a violation of this Agreement for the Union to withdraw its members, or to refuse to man any job of an employer who fails or refuses to comply with the provisions herein contained and such a withdrawal of members or refusal to man the job shall not be a strike or work stoppage within the terms of this Agreement.

Appendix I

ARTICLE XVI
INDEMNITY BOND

1. An Indemnity Bond furnished through a recognized bonding company in the amount of two thousand five hundred dollars ($2,500.00) or a certified cashiers check in the amount of two thousand five hundred dollars ($2,500.00), shall be deposited by the individual employer at the office of the California Lathing and Plastering Contractors Association, Sacramento Chapter, Inc., prior to the commencement of work in the area of jurisdiction covered herein.

(a) The Indemnity Bond shall be in a form as approved and acceptable to the Joint Conference Board.

(b) The Indemnity Bond shall be made payable to the Sacramento Lathing and Plastering Industry Joint Conference Board, 3122 O Street, Sacramento, California 95816, as Obligee.

(c) The Indemnity Bond shall be renewed and posted annually on or before its anniversary date by the individual employer or his agent.

(d) The Indemnity Bond or certified cashiers check shall indemnify for any assessment for wages, liquidated damages, for violation of the contract and/or contributions for Trade Promotion, or Health and Welfare, or Pensions, or Vacation Plan, for liquidated damages for the late payment of same, and for employee benefits as provided for in the Agreement.

2. In the event the Indemnity Bond or certified cashiers check must be assessed pursuant to its indemnifying

clauses, due to the refusal or inability to pay accredited amounts due by the individual employer, the individual employer shall be considered as having defaulted.

(a) Before a defaulting individual employer can resume his operations, he must reinstate his good standing by:

(1) satisfying any and all obligations consistent with the terms of the Labor Agreement and with the provisions and stipulations of the Indemnity Bond.

(2) depositing a cash bond in the amount of two thousand five hundred dollars ($2,500.00) with the California Lathing and Plastering Contractors' Association, Sacramento Chapter, Inc., and payable to the Sacramento Lathing and Plastering Industry Joint Conference Board.

3. Health and Welfare, Promotion, Pension and Vacation transmittals shall become due and payable on the first (1st) day of the month following the month for which the work was performed.

(a) All of said transmittals shall be made monthly.

(b) Each transmittal shall cover the period of the last previous month in which the hours were worked and shall be made not later than the tenth (10th) day of each month.

(c) Each transmittal shall be accompanied by a report showing how the transmittal was computed; such report shall be on each form and show such information as the particular fund to which payment is made shall require.

(d) When an employer fails to make any of the said transmittals and reports so as to be received by the fund to whom such payments are to be made by the twentieth (20th) day of the calendar month in which the payment is due, such employer shall be assessed an amount equal to

ten per cent (10%) of the delinquent payment, but in no event less than twenty dollars ($20.00) per fund per month, as liquidated damages for the additional expense resulting from the delinquency.

(e) At any time when any employer is delinquent in making payment to any of said funds, the Union may remove employees from any shop or job of the delinquent employer and refuse to furnish employees to such shop or job.

4. Upon the delinquency of any employer, the Joint Conference Board shall authorize the Administrator to seek and obtain payment from the bonding company or certified cashiers check on deposit by the defaulting individual Employer, in the amount equal to the delinquent payments, and liquidated damages as outlined in Section 1. (d) and 3. (d) of this Article XVI.

5. The California Lathing and Plastering Contractors Association, Sacramento Chapter, Inc., may furnish a blanket bond for all its members covering each member for two thousand five hundred dollars ($2,500.00) and shall be subject to any and all stipulations as set forth above.

Appendix J

ARTICLE XX
JOINT CONFERENCE BOARD

1. It is hereby agreed between the parties to this Agreement that since this Agreement provides for the orderly and amicable adjustment and settlement of all disputes, differences, and grievances, there shall be no resort to strikes, which includes stoppages or slow down of work by the employees or any lockout by the employer. In order to carry into effect the terms of this Agreement, the parties hereto appoint the Joint Conference Committee for the purpose of abritrating and settling disputes, differences and grievance.

2. The Committee shall be composed of three (3) members of the California Lathing and Plastering Contractors Association, Sacramento Chapter, Inc., and three (3) members of the Lathers' Local Union No. 109. From this group a chairman and secretary shall be elected; one from the Contractor members and the other from the Union group.

3. Any member of the Committee who is an employer representative may be removed at any time at the discretion of the Contractor Association by written notification to the Joint Committee.

4. Any member of the Committee who is a Union representative may be removed at any time at the discretion of the Lathers' Local Union No. 109 by written notification to the Joint Committee.

5. The Joint Conference Committee shall meet on the fourth (4th) Tuesday of each and every month at 8:00 p.m. in the California Lathing and Plastering Contractors Association office, 3122 O Street, Sacramento, California 96816.

6. The Joint Conference Committee shall have the following general powers in addition to specific powers conferred on it by this Agreement:

(a) To hear and determine all disputes, differences and grievances between the parties and any alleged violations of the contract.

(b) To terminate or suspend the Agreement with any contractor found guilty of violating this Agreement.

(c) To impose fines of $50.00 for violations of the contract.

(d) To use fines collected for administration and operational expenses of the Apprentice Program.

7. The Union, any employer, any employee, the Contractor Association, Sacramento Chapter, may submit a matter of dispute to the Joint Conference Committee by filing with the secretary notification in writing setting forth with as much detail as possible the nature of the matter, the person or persons involved, if any, and the remedy sought if any. Any journeyman who causes a contractor to be cited before the Joint Conference Committee for infraction of the Agreement through his Business Agent or otherwise shall be required to personally appear as a witness and state his case if requested by the Committee.

(a) Notice of time, date and place of hearing shall be given to any person directly interested in the hearing by written communication at his last known address.

(b) At the request of any party all persons not having a direct interest in the matter being heard shall be excluded from the hearing.

(c) Any party to the matter under consideration may offer such evidence as they may desire.

(d) If in any event any member of the Committee has a direct interest in the matter of dispute, such member shall not take part in the hearing or decision.

(e) The Joint Conference Committee shall render a decision within five (5) days after the matter has been fully heard by it and such decision shall be final and binding on all parties to the dispute.

(f) If the Joint Conference Committee fails to reach a decision within five (5) days after the matter has been fully heard by it, the dispute shall be referred to arbitration unless the parties to said dispute agree by mutual consent to extend the time. If no agreement is reached upon an arbiter, or upon the extension of time, the Committee, through the chairman, shall within twenty-four (24) hours request the Federal Mediation and Conciliation Service to submit five (5) names as arbiters, and each party shall have the right to cancel two (2) names and the fifth (5th) or remaining person shall make the decision which decision shall be final and binding on both parties.

(g) The Joint Conference Committee, or the arbiter shall have no authority to alter, amend, or revise the wages, hours and other conditions set forth herein.

(h) There shall be no strikes, slow downs, stoppages of work, or lockouts unless the charged party fails to abide by the decision of the Joint Committee or impartial arbiter.

(i) There shall be no cessation or interference in any way with any of the work of the employers by reason of jurisdictional disputes between the various unions affiliated with the AFL-CIO. Such disputes shall be settled in a manner and under conditions suitable and agreeable to the Unions themselves.

(j) Any expenses of the Joint Conference Committee or an arbiter who has been appointed shall be borne by the losing party or shall be prorated equally among the parties upon the order of the Joint Conference Committee or the arbiter, as the case may be.

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No. 80-2048

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MATSON PLASTERING CO., INC.,
Petitioner,

VS.

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO, PLASTERERS LOCAL UNION NO. 295,
Respondent.

MATSON PLASTERING CO., INC.,
Petitioner,

VS.

LATHERS LOCAL UNION L-109, and DEAN PUTHUFF,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

I

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Whether strikes which are arguably in violation of a no-strike clause contained in a collective bargaining agreement are enjoinable under the rule established by

Boys Market v. Retail Clerks Union Local 770, 398 U.S. 235 (1970)?

2. Whether parties to a collective bargaining agreement may exempt from the no-strike obligation and/or the grievance procedure specific disputes, so as to preclude the exercise of jurisdiction by a district court to enjoin a strike?

II

COUNTER-STATEMENT OF THE CASE

This is a petition for writ of certiorari from two judgments of the Ninth Circuit involving the same employer but different labor organizations. In both cases, the district court issued an *ex parte* temporary restraining order as well as an order to show cause. In both cases, counsel appeared at the hearing and moved to dismiss the complaints. F.R. Civ. P. 12(b)(6). After denying those motions, the district court entered preliminary injunctions enjoining strike activity. The district court did not hold an evidentiary hearing or enter findings of fact to support the injunctive decrees.

The unions which were subject to those decrees appealed to the Court of Appeals for the Ninth Circuit. The Ninth Circuit in both cases reversed finding that the court lacked jurisdiction to enjoin the strikes and remanded for further appropriate proceedings.

We shall show in this memorandum that no substantial issue warranting review by this Court is present.

III

THE COURT LACKED JURISDICTION TO ENJOIN A STRIKE WHICH IS ARGUABLY IN BREACH OF THE NO-STRIKE CLAUSE

Each of the collective bargaining agreements between Lathers Local L-109 and Operative Plasterers and Cement Masons Local 295 contains an explicit no-strike clause. Implicit within the question, as posed by the Petitioner, is an argument that a district court has jurisdiction to enjoin a strike which arguably violates a no-strike clause. That proposition has been squarely rejected by this Court and we need not deal with it further. See *Boys Market v. Retail Clerks Union Local 770*, 398 U.S. 235, 253-256 (1970); and *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397, 409 (1976).

We now turn to the other issue raised as to whether the parties may exempt certain grievances from the implied or expressed no-strike obligation, thus barring injunctive relief under the doctrine of *Boys Market, supra*.

IV

IN BOTH COLLECTIVE BARGAINING AGREEMENTS THE PARTIES HAVE EXEMPTED THE PARTICULAR DISPUTE INVOLVED FROM THE GRIEVANCE AND/OR NO-STRIKE OBLIGATION

We now turn briefly to the dispute involved. Matassa Plastering is party to a collective bargaining agreement

with both the Lathers as well as the Operative Plasterers.[1] Matson was delinquent in certain trust fund contributions and was assessed $775.78 for late payment of contributions to trust funds.[2] As a result of the employer's refusal to pay the assessment, first the Plasterers and then the Lathers took strike action to force payment of the delinquency charge.

We now turn to the precise language in the collective bargaining agreement which is relevant to this issue. The agreement with the Plasterers provides:

> Notwithstanding any provisions in the Agreement to the contrary, no dispute, complaint or grievance arising out of the failure or refusal of an employer to comply with the Union Security and hiring hall, wages, transportation, health and welfare, pension, vacation, fringe benefits or other remuneration shall be subject to the grievance or arbitration provisions

---

[1]Matson raises a question as to whether it was bound to the Plasterers Agreement when the trust fund obligation arose. Since the district court failed to enter findings, or hold an evidentiary hearing, that issue has not been resolved. If Matson was not bound to the contract at the time the trust fund obligations arose, then there would clearly be no obligation to arbitrate the dispute on the union's part. If Matson was bound, then the principles discussed above apply.

[2]The court below erroneously referred to this assessment as being levied "by the Union for late payment of contributions to the Union trust fund." The levy was by jointly trusteed trust funds, 29 U.S.C. Section 186. The employer contends, however that the assessment was levied by the union and not by either the trust funds or a joint conference committee consisting of employer and union representatives. That issue was not resolved by the district court and the pleadings submitted by the employer are less than clear on this point. It is, however, agreed that an assessment was made in the amount specified.

of this contract. It shall not be a violation of this Agreement for the Union to withdraw its members, or to refuse to man any job of an employer who fails or refuses to comply with the provisions herein contained and such a withdrawal of members or refusal to man the job shall not be a strike or work stoppage within the terms of this Agreement." Article XIV, Section 2(f) (Appendix H to Petition).

* * *

"Any employer who becomes signatory to this Agreement and is owing wages, travel pay, fringes and/or assessed penalties in another area not covered by this Agreement, the union may remove employees from any shop or job of any individual delinquent employer, and refuse to furnish employees to said delinquent employer until full payment has been made." Article XIII, Section 1 (Appendix G to Petition).

Given these two clauses which specifically exempt from the no-strike provisions and the grievance procedure questions of delinquencies, we submit that the court below had no alternative but to find that there was no jurisdiction to

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[2] The company suggests in its petition that the union misreads both exceptions. We believe the courts below properly resolved that issue. In any case, this matter has been remanded to the district court for further proceedings to determine whether the union should be forced to arbitrate the question of whether it violated the collective bargaining agreement in taking strike action. Cf. *Drake Bakeries, Inc.* v. *Local 50, Bakery Workers*, 370 U.S. 254 (1962). We do not concede, however, that the employer's claim against the union for damages is timely or appropriate. In any case, the grant of injunctive relief is discretionary and where it so clearly appears that the parties have attempted to exempt these issues from grievance and the no-strike obligation, the district court improperly enjoined the strike.

enjoin the strike. This Court has specifically recognized that parties may exempt issues from the no-strike obligation, thus precluding the exercise of jurisdiction by a court to enjoin a strike. See *Gateway Coal Company v. United Mine Workers*, 414 U.S. 368, 382-384 (1974). See also *Layne-Western Co. v. Operating Engineers Local 513*, ____ F.2d ____, 107 LRRM 2742 (8th Cir. 1981); and *Martin Hagelaad, Inc. v. United States District Court*, 460 F.2d 789 (1972).

We now turn to the Lathers' Agreement. The Lathers' Agreement provides as follows:

> "At any time when any employer is delinquent in making payment to any of said funds, the Union may remove employees from any shop or job of the delinquent employer and refuse to furnish employees to such shop or job." Article XVI(3)(e) (Appendix I to Petition).
>
> • • •
>
> "There shall be no strikes, slow downs, stoppages of work, or lockouts unless the charged party fails to abide by the decision of the Joint Committee or impartial arbiter." Article XX(7)(h) (Appendix J to Petition).

Matson concedes that it was delinquent in making payment to the various trust funds. It, however, argues that it had paid the contribution and was only delinquent in remitting the delinquency fee. Consistent with the principles expressed above, the court properly concluded that the parties had expressed an intent to permit the union to take economic action.

Moreover, the contract specifically provides that the union may strike where "the charged party fails to abide by the decision of the Joint Committee . . ."[6]

Under the principles expressed above, no injunction was permissible under the Lathers' Agreement because of the parties' expressed intent to remove from the no-strike obligation and/or the grievance procedure precisely the dispute which arose in this case.

In summary, the teaching of *Boys Market*, as explained by *Gateway Coal* and *Buffalo Forge*, is that *Boys Market* is a narrow exception to the broad prohibition against the exercise of jurisdiction to enjoin strikes contained in the Norris-LaGuardia Act, 29 U.S.C. Section 104. Here with respect to both the Lathers and Plasterers, the collective bargaining agreements either exempt the dispute from the grievance procedure or expressly permitted the union to take strike action.[7]

---

[6]Matson contends that the Joint Committee did not make a decision assessing the penalty, but rather that the unions involved made the assessment. Once again, the district court did not resolve this factual issue and the record is insufficient in this regard.

[7]The employer rests its argument upon a contention that the union is arguably wrong with respect to the interpretation of the breadth of the no-strike clause and/or the exemption from the grievance procedure. The teaching of these cases, however, is that the district court must evaluate the claims of the union as to the nature of the strike and the dispute involved. Not only do we contend that the court of appeal was correct in the resolution of this issue, but also the failure of the district court to follow the procedures outlined in F.R. Civ. P. 65, as well as 29 U.S.C. Section 107, make this case unsuitable for review by this Court.

V

THERE ARE INDEPENDENT REASONS WHY THE INJUNCTIONS WERE IMPROPER

In response to the order to show cause, counsel for the unions moved to dismiss the actions. After those motions were denied, counsel requested that the court hold an evidentiary hearing prior to the issuance of any injunctive decree. The court declined. Thereafter, the court issued injunctive decrees without entering findings of fact or conclusions of law. We submit that the procedural requirements of Norris-LaGuardia applied and the district court's failure to follow those mandates made the injunctions void. 29 U.S. C. § 107. See, *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc.*, 529 F.2d 1073 (9th Cir. 1976), *vacated and remanded on other grounds*, 429 U.S. 807 (1976), *reversed on other grounds*, 550 F.2d 1237 (9th Cir. 1977); *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974); *Detroit Newspaper Publishers' Association v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972); *Emery Air Freight Corporation v. Local Union 295*, 449 F.2d 586 (2nd Cir. 1971); and *United States Steel v. United Mine Workers*, 456 F.2d 483 (3d Cir. 1972).

CONCLUSION

For the reasons suggested above, the petition for writ of certiorari should be denied.

Dated: August 1981

Respectively submitted,

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No. 80-2048

In the Supreme Court
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VS.

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REPLY BRIEF TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

THE NINTH CIRCUIT COURT OF APPEALS COMMITTED LEGAL ERROR IN HOLDING THAT THE DISTRICT COURT HAD NO JURISDICTION TO DETERMINE WHETHER THE PARTIES INTENDED TO EXCLUDE THE UNDERLYING DISPUTE FROM THE ARBITRATION PROCEDURES AND NO-STRIKE CLAUSE OF THE COLLECTIVE BARGAINING AGREEMENTS

Respondents' claim within their Opposition Brief that the Ninth Circuit Court of Appeals' Opinion (see, Appendix "B" to the Petition) provides that both the Lathers and Plasterers' collective bargaining agreements expressly exempt the underlying dispute from the arbitration procedures and no-strike provisions.[1] However, Respondents' characterization of the Ninth Circuit Court of Appeals' decision is clearly erroneous.

The Ninth Circuit Court of Appeals' Opinion does not make any determination whatsoever as to whether the

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[1]At page 6 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents state: "Consistent with the principles expressed above, the Court properly concluded that the parties had expressed an intent to permit the union to take economic action." At page 7 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents state: "Under the principles expressed above, no injunction was permissible under the Lathers' agreement because of the parties expressed intent to remove the no-strike obligation and/or the grievance procedure precisely the dispute which arose in this case." Also, at page 7, Respondents state: "Here with respect to both the Lathers and Plasterers the collective bargaining agreement either exempted the dispute from the grievance procedure or expressly permitted the union to take strike action."

parties intended to exclude the underlying dispute from the arbitration procedures and no-strike provisions of the respective collective bargaining agreements. On the contrary, the Ninth Circuit Court of Appeals never reached that issue regarding the parties' intent. Instead, the Ninth Circuit adopted a rule that the District Court loses jurisdiction to determine that issue whenever the union *disputes* whether its strike is over an arbitrable issue (regardless of the fact that the union fails to file any affidavits or present any evidence in support of its position).[2]

---

[2]As was stated by the Ninth Circuit Court of Appeals: "*Boys Market* carved out a narrow exception to the structures [against the issuance of injunctions in cases involving or growing out of labor disputes]. It overruled prior case law . . . and held that the Norris-La Guardia Act did not prohibit an injunction to enforce an *undisputed* contractual obligation not to strike and to submit to binding arbitration. Absent such a clear contractual duty, *Boys Market* leaves the strictures of the Norris-La Guardia Act undisputed." [At page A-5 of Appendix "B" to the Petition; emphasis added].

"Most importantly, the Court held that in a *Buffalo Forge* type case a District Court may not issue an injunction pending the arbitrator's decision where it is *not clear* whether the strike is over an arbitrable issue and is in direct violation of a no-strike clause." [At page A-7 of Appendix "B" to the Petition; emphasis added].

"Equally true under *Buffalo Forge* is that where it is *not clear* that the strike is over an arbitrable issue and is in violation of a no-strike clause, the District Court has no jurisdiction to enjoin strike activity pending the arbitrator's decision." [At page A-7 of Appendix "B" to the Petition; emphasis added].

Based on the above, the Ninth Circuit ruled that the District Court lacked jurisdiction to determine whether the parties intended to exclude the underlying dispute from the arbitration procedures solely because the union "disputed" whether the underlying grievance was subject to the mandatory arbitration procedures, and regardless of the fact that the union failed to file any affidavits or submit any evidence in support of its position.

The Ninth Circuit Court of Appeals' holding is clearly erroneous. Both *Boys Market v. Retail Clerks' Union Local 770* (1970) 398 U.S. 325, and *Buffalo Forge Co. v. United Steel Workers of America, AFL-CIO,* 428 U.S. 397 (1976) hold that a District Court retains jurisdiction to enjoin a strike if the underlying dispute falls within the arbitration provisions of the collective bargaining agreement. Yet, the Ninth Circuit Court of Appeals' decision precludes the District Court from making that very determination.

At pages 3-7 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents set forth a number of provisions of the collective bargaining agreements in an effort to convince this Honorable Court that the parties intended to exclude the underlying dispute from the arbitration procedures.[3] However, this Honorable Court

[3]Appendix "G" to the Petition contains an inadvertent printing error. Therein, the first paragraph of Section 2 of Article XIII is erroneously omitted. Attached hereto as "Amended Appendix G" is a corrected copy of Article XIII of the Plasterers' collective bargaining agreement, including the first paragraph of Section 2 thereof.

At page 5 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents cite paragraph 3 of Article XIII, Section 2 of the Plasterers' collective bargaining agreement in support of their argument that the parties intended to exclude the underlying dispute from the arbitration procedures. However Respondents have never before relied on paragraph 3 of Article XIII, Section 2, (either before the District Court or the Ninth Circuit Court of Appeals). Rather, Respondents previously relied upon paragraph 1, Article XIII, Section 2 of the Plasterers' collective bargaining agreement. [See, Appendix "K" attached hereto, which is a copy of page 5 of Respondents' Opening Brief to the Ninth Circuit Court of Appeals, wherein Respondents argued to the Ninth Circuit Court of Appeals that paragraph 1 of Article XIII, Section 2 exempted the instant dispute from mandatory arbitration.] Respondents should not now be allowed to rely on paragraph 3 of Article XIII, Section 1 of the Plasterers' collective bargaining agreement for the first time.

need *not* consider said arguments cited at pages 3-7 of Respondents' Memorandum In Opposition To Petition For Writ Of Certiorari. The issue presented for review herein is not whether the parties intended to exclude the underlying dispute from arbitration, but rather, whether the Ninth Circuit Court of Appeals committed legal error in holding that the District Court was without jurisdiction to consider that very issue.[4] Petitioner therefore asks this Honorable Court to first rule that *the District Court had jurisdiction to determine that issue,* and then to remand the case back to the Ninth Circuit Court of Appeals if this Honorable Court believes the District Court's determination of that issue requires review.

---

[4]At pages 1 and 2 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents claim that the issues presented for review are (1) "Whether strikes which are arguably in violation of a no-strike clause contained in a collective bargaining agreement are enjoinable under the rule established by *Boys Market v. Retail Clerks Union Local 770,* 398 U.S. 235 (1970)", and (2) "Whether parties to a collective bargaining agreement may exempt from the no-strike obligation and/or the grievance procedure specific disputes, so as to preclude the exercise of jurisdiction by a District Court to enjoin a strike." Respondents have simply misstated the issues. The Ninth Circuit Court of Appeal did not make any determination as to whether the unions' strike was in violation of a no-strike clause, and/or whether the parties may or may not exempt specific disputes from the no-strike obligation and/or grievance procedures. Rather, the Ninth Circuit Court of Appeal merely held that the District Court lacks jurisdiction to determine whether the strike is over an arbitrable issue whenever the union "*disputes*" whether the underlying grievance falls within a no-strike clause and/or arbitration clause of a collective bargaining agreement.

II

THE DISTRICT COURT DID NOT FAIL TO FOLLOW THE PROCEDURAL REQUIREMENTS OF THE NORRIS-LA GUARDIA ACT

At page 8 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents argue that the District Court failed to hold an evidentiary hearing, and failed to make any findings of fact or conclusions of law prior to the issuance of the injunctive decree. However, it is well settled that where an evidentiary hearing is useless, then such a hearing is not necessary. [*Amalgamated Transit Union Div., 1384 v. Greyhound Lines, Inc.* (1976) 529 F.2d 1073; vacated and remanded on other grounds (1976) 429 U.S. 807, reversed on other grounds (9th Cir., 1977) 550 F.2d 1237; *Hoh v. Pepsi Co., Inc.* (2d Cir., 1974) 491 F.2d 556.

The only reason the District Court declined to hold an evidentiary hearing and enter findings of fact was because Respondents never raised any factual questions for the District Court to resolve. Respondents never filed any affidavits or declarations with the District Court, and Respondents never produced any witnesses to testify at the hearings on the Orders To Show Cause below. On the other hand, Matson Plastering Co., Inc. did file affidavits with the District Court setting forth those facts in support of its contentions with respect to both Local 295 and Local L-109's strike activity.

Because of Respondents' failure to file any counter affidavits and/or produce witnesses, those facts set forth within the employer's affidavits were uncontested. There

was therefore no need for the District Court to hold an evidentiary hearing or to make findings of fact.

Even if, assuming arguendo, this Honorable Court felt the District Court's injunctions were procedurally defective, such would not preclude review of the Ninth Circuit Court's Opinion. In such an event, Petitioner would ask this Court to first overturn the Ninth Circuit's Opinion by ruling that the District Court has *jurisdiction* (to determine whether the parties intended to exclude the underlying dispute from the arbitration and no-strike provisions of the respective collective bargaining agreements), and then to remand this case to the District Court with instructions to follow whatever procedures are necessary.

III

CONCLUSION

Petitioner, Matson Plastering Co., Inc. respectfully prays that this Honorable Court grant this Petition For Writ Of Certiorari regarding the Ninth Circuit Court of Appeals' December 12, 1980 judgment and April 30, 1981 judgment.

Dated: September 15, 1981.

Respectfully submitted,

THE LAW FIRM OF
THOMAS E. CAMPAGNE
A PROFESSIONAL CORPORATION

By THOMAS E. CAMPAGNE
Attorneys for Petitioner

(Appendices follow)

Amended Appendix G

ARTICLE XIII, TIME FOR PAYMENT TO ALL FUNDS

Section 1. The payments provided for herein are due and payable on or before the tenth (10th) day of the current month and are for hours worked in the preceding month. Contributions shall be made on a reporting form provided by the trustees and must be filled in properly. Payments not received by the twentieth (20th) day of the current month shall thereupon become delinquent and such delinquent employer shall be assessed an amount equal to ten (10%) percent of the delinquent payment, but in no event less than Twenty ($20.00) Dollars per Fund per month as liquidated damages for the additional expense resulting from the delinquency. Postmarks will not be accepted as having been received by the twentieth (20th) day of the current month. Whenever the twentieth (20th) days of the month falls on Saturday, Sunday or holidays, the following business day shall be acceptable as being received. Remittance checks not honored by the bank on the initial deposit for reason of "insufficient funds" shall be considered as non-payment and the employer declared delinquent.

Section 2. For any non-payment of wages, travel pay, fringes and/or assessed penalties, the Union may remove employees from any shop or job of any individual delinquent employer until full payment has been made.

Any employer who is signatory to this Agreement and becomes delinquent in the payment of wages, travel pay,

fringes and/or assessed penalties in another area not covered by this Agreement, the Union may remove employees from any shop or job of any individual delinquent employer, and refuse to furnish employees to said delinquent employer until full payment has been made.

Any employer who becomes signatory to this Agreement and is owing wages, travel pay, fringes and/or assessed penalties in another area not covered by this Agreement, the Union may remove employees from any shop or job of any individual delinquent employer, and refuse to furnish employees to said delinquent employer until full payment has been made.

Section 3. In cases relative to dispute over the payment of wages and/or fringe benefits, at the recommendation of the Joint Conference Board and upon notice in writing from the Joint Conference Board, an individual employer must permit a representative or representatives (including an accountant) of the Joint Conference Board to enter upon the premises of such individual employer during business hours, at all reasonable time or times and to examine and copy reports of such individual employer as may be necessary to determine whether the individual employer is making full and prompt payment of all sums required to be paid by him to the various Trust Funds and/or wages. In the event that such an examination reveals that such employer is not making full and prompt payments of all sums required to be paid by him to the various Trust Funds and/or wages, then, and in that event, such individual employer shall pay such cost, including accountant fees, as may have been reasonably incurred in making such

determination. Upon the written request of the Joint Conference Board of their duly authorized representative, such employer records shall be audited at the office of Trust Fund in question.

Appendix K

There are certain relevant provisions of the Collective Bargaining Agreement. First, the employer relies upon Section 1, Article XIV, which provides as follows:

> "Section 1. During the term of this Agreement and so long as neither party is in violation of any of the provisions of this Agreement, there shall be no strike or lockouts." (Ex. 24)

The Union, however, relies upon those provisions of the Collective Bargaining Agreement which grant the Union a privilege to engage in strike activity under specified conditions:

> "Section 2. For any non-payment of wages, travel pay, fringes and/or assessed penalties, the Union may remove employees from any shop or job of any individual delinquent employer until full payment has been made." (Ex 23)
>
> * * *
>
> "Article XIV (f) Notwithstanding any provisions in the Agreement to the contrary, no dispute, complaint or grievance arising out of the failure or refusal of an employer to comply with the Union Security and hiring hall, wages, transportation, health and welfare, pension, vacation, fringe benefits or other remuneration shall be subject to the grievance or arbitration provisions of this contract. It shall not be a violation of this Agreement for the Union to withdraw its members, or to refuse to man any job of an employer who fails or refuses to comply with the provisions herein contained and such a withdrawal of members or refusal to man the job shall not be a strike or work stoppage within the terms of this Agreement (Ex 25)

Within these provisions of the Collective Bargaining Agreement, there is no basis, as we shall show below, for the issuance of any injunctive relief against the strike activity.

IV. A BOYS MARKETS INJUNCTION MAY NOT ISSUE WHERE THE DISPUTE IS NOT SUBJECT TO THE GRIEVANCE PROCEDURE

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